STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 25, 2011
v	No. 298869 Kent Circuit Court
CHARLES JUDSON HOLBROOK, Defendant-Appellant.	LC No. 09-008856-FH

Before: GLEICHER, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felon-in-possession of a firearm, MCL 750.224f, accosting a child for immoral purposes, MCL 750.145a, two counts of possessing child sexually abusive material, MCL 750.145c(4), two counts of allowing a child to engage in child sexually abusive activity, MCL 750.145c(2), and two counts of producing child sexually abusive material, MCL 750.145c(2). We affirm.

I. FACTS

One day in the summer of 2009, JR, then 14 years old, was stopped by defendant while she walked to a friend's house. Defendant gave JR $5 to give to her sister Sara Blok. After JR took the money, defendant asked her to put it in her bra. JR said no, and she started to walk away, but defendant grabbed her hand. He asked JR if she was still a virgin. JR replied that it was none of his business. Defendant then asked JR if she wanted to have sex with him. JR "freaked out" and ran to her friend's house.

After speaking with JR, Detective Tim Pols of the Wyoming Police Department obtained a search warrant and executed a search of defendant's house. Defendant arrived during the search, and confirmed to Pols that the northeast bedroom of the house was his bedroom. Defendant's son also lived in the house, but he stayed in the basement.

Defendant's bedroom contained a bed and two dressers. Two baggies were found under the bed covers; one contained a small bra, the other a bra and panties. In addition, a bread bag containing a pair of pink panties and a yellow bag containing a swimsuit top were found near the bed. Numerous tissues were on the floor surrounding the bed. Four handguns and two long guns were also found in the bedroom. The guns, which were in various states of repair, were either in a dresser or in the closet. Pols tested one of the handguns found in the dresser, and that handgun

was operable. Also in the dresser were items of paperwork bearing defendant's name and address.

Pictures were found throughout defendant's bedroom. There were pictures in a basket, in envelopes, and in bags near defendant's bed. There were also pictures on the floor, in a green plastic tote, and in dresser drawers. Numerous pictures found in defendant's bedroom were admitted into evidence. There were pictures of Blok. In two of them, taken at a nudist camp, Blok was sitting in a chair, covering herself with her arms, and her breasts and genitalia were visible. There were pictures of Angeline Simones. In the pictures, Simones was topless, and in some of the pictures, she was posed with her sister, Rachel Kreplik, who was also topless. There were pictures of Renee Heiss. In one picture, Heiss was standing naked in defendant's shower. In other pictures, Heiss was topless. There were pictures of Erica Campbell, in which she was topless. There were also pictures of Jamie Fisk, including one of her standing naked in defendant's shower. In addition, there were three pictures of a nude unidentified girl.[1]

Hundreds, if not thousands, of negatives were found in defendant's house. Pols looked at many of the negatives, and he processed approximately 50 of them. Four pictures that were processed from the negatives were admitted into evidence. Three of the pictures were of Campbell. One of the pictures showed Campbell, when she was 14 or 15 years old, standing naked in a shower at a nudist camp.[2]

Defendant's car was also searched, and a camera with undeveloped film was found. The undeveloped film contained a picture of Heiss topless and two pictures of Campbell.

As part of the investigation, Pols reviewed pictures retained by the Wyoming Police Department from a 2000 incident involving defendant, which led to a conviction in 2001. The retained pictures included several of Blok. In two pictures, Blok's breasts were exposed. Two other pictures were duplicates of the pictures found in defendant's bedroom of Blok sitting in a chair at a nudist camp. Another picture showed Blok laying on defendant's bed with her legs spread. The retained pictures also included several of Campbell and of Rebecca Wheeler. One picture of Campbell depicted her naked in a locker room at a nudist club, and the picture contained defendant's reflection in a mirror. The pictures of Wheeler included one of Wheeler nude at a nudist camp and two of Wheeler topless at defendant's house. Pictures that had been seized from defendant's house in 2000 and that were not retained by the Wyoming Police Department had been returned to defendant.

Fisk testified that she was 26 years old. She met defendant through Blok, her classmate, when she was 14 years old and in the seventh grade. After meeting defendant, Fisk saw defendant almost every day. Defendant would pick her up from school and take her shopping or she would go to defendant's house, where he would give her alcohol. Fisk remembered one time

[1] We clarify that not all the pictures found in defendant's bedroom were of females nude or topless.

[2] The fourth picture developed from the negatives was of JR.

when she went to a park with defendant when, in the car, she took off her shirt and bra. She kept her coat on. In the park, defendant asked Fisk to unzip her coat, Fisk did and exposed her breasts, and defendant took pictures.

Fisk moved to New Mexico when she was in the ninth grade, and did not return to Michigan until after she was 18 years old, at which time she was using drugs. After she returned to Michigan, Fisk allowed defendant to take pictures of her topless between 20 and 30 times. She agreed to take the pictures in exchange for money. The pictures, in which Fisk posed at defendant's direction, were taken at defendant's house. Fisk stated that the picture found in defendant's bedroom of her standing naked in the shower was taken after she had turned 18 years old. Fisk did not believe that she had posed topless for any pictures with any other girl. If she had, it would have been with Heiss, who was like a sister to her.

Heiss testified that she was 23 years old. She was the mother of two children, a five-year-old, who was born when she was 18 years old, and a one-year-old. Heiss met defendant through Fisk when she was 15 or 16 years old. She saw defendant approximately once a week and always with Fisk. Defendant would take pictures of her and Fisk at a park; she and Fisk were clothed for the pictures.[3] Fisk started spending time alone with defendant at his house several months later. Defendant would buy her clothes or give her money, which she used for drugs.

Defendant first asked Heiss to take topless or nude pictures about a year after they met. The request came when they were at a park. Heiss had asked defendant for some money, and defendant replied that he would give her money only after she posed for some pictures. Heiss refused to take topless pictures, but she agreed to take her bra off, while keeping her shirt on. According to Heiss, it was a "tight shirt" and one "could pretty much see everything."[4]

Defendant continued to ask Heiss to take topless pictures, and she eventually agreed to do it. This was before she was pregnant with her oldest child. She did not want to do it, but defendant refused to give her money unless she posed for pictures. Heiss pulled her shirt halfway down and posed at defendant's direction. He told her to lean back, or to turn sideways, or to push her breasts together. After defendant took the pictures, he gave Heiss money. Heiss has never seen the pictures taken that day.

According to Heiss, there were multiple times that she posed for nude or topless pictures. However, she could not recall whether there were any other times that she posed topless before she was pregnant. The nude or topless pictures of her that were found in defendant's bedroom were taken after the birth of her daughter. She knew this because there was a mark on one of her breasts that she did not have until after she had given birth. Heiss remembered the day that those pictures were taken—it was a day that she needed money. Heiss also agreed that the topless

[3] Several pictures of Heiss and Fisk taken at parks were found in defendant's bedroom.

[4] Heiss had several of these pictures in her possession and they were shown to the jury.

picture of her found on the undeveloped film in defendant's camera was taken after she had turned 18 years old.

Simones testified that she was 21 years old. She met Fisk in December 2005, at which time she was already addicted to drugs. Fisk brought Simones to defendant's house in April 2006 to get money. Defendant told Simones that he would give her money in exchange for him taking pictures of her with her clothes off. Simones agreed because she needed money for drugs. She posed, as instructed by defendant, wearing only her underwear. According to Simones, Fisk was in some of the pictures with her. Defendant took pictures of Simones and Fisk, who was also topless, kissing and rubbing against each other. Simones received $350 from defendant. She has never seen any of the pictures that were taken in April 2006.

After that day, Simones continued to go to defendant's house, but she only went inside the house another five to seven times. Each of those times, she received money from defendant. However, only during a visit in April 2008, when she was 18 years old, did she again pose topless for pictures, and a few of those were taken with her sister. Simones admitted that the topless pictures of her found in defendant's bedroom were taken in April 2008.

Blok testified that she was 25 years old. She met defendant, who lived down the street from her family, more than ten years earlier. When she was a young teenager, Blok started spending time alone with defendant. Defendant would buy her things, such as clothes, cigarettes, and alcohol. Defendant also took pictures of her. Eventually, he took pictures of her topless, and in exchange, he would give her money or buy her stuff. According to Blok, the two pictures found in defendant's bedroom of her at a nudist camp were taken when she was 14 or 15 years old. Blok further testified that she was 15 or 16 years old when defendant took the picture of her laying on his bed. It was true that after defendant took the picture, he had physical sexual contact with her. Blok admitted that defendant did not take any nude or topless pictures of her after June 2001.

Campbell testified that she was 23 years old. She met defendant when she was a young teenager. Defendant would buy her clothes and shoes. Defendant took pictures of her at parks, at his house, and at a nudist club, including the picture that was retained by the Wyoming Police Department in the 2000 incident. The topless pictures of her found in defendant's bedroom and the undeveloped picture of her in defendant's camera were taken within the past couple years. She agreed to take those pictures in exchange for money.

Wheeler testified that she was 24 years old. She met defendant in 1999 when she was 13 years old. Defendant would buy things for her, including shoes, clothes, and food, and Wheeler soon began going to defendant's house. Defendant took pictures of her, including some where she was topless, at parks, a nudist camp, and his house. According to Wheeler, defendant offered to pay her money for the pictures, but she never received any money from defendant. All the pictures were taken before June 2001.

II. SUFFICIENCY OF THE EVIDENCE

On appeal, defendant argues that his convictions are not supported by sufficient evidence. We disagree.

We review de novo challenges to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *Id.* We must make all credibility choices in favor of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant argues that his conviction for felon-in-possession of a firearm is not supported by sufficient evidence because there was no evidence connecting him with the guns other than the guns being found in his bedroom. He claims that the conviction was based solely on his presence where the guns were found.

Possession of a firearm may be actual or constructive. *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000). A defendant has constructive possession of a firearm if the location of the firearm is known and the firearm is readily accessible by the defendant. *Id.* Here, six guns were found in the northeast bedroom of defendant's house. Defendant confirmed to Pols that the northeast bedroom was his bedroom. Several of the guns were found in a dresser that contained paperwork bearing defendant's name and address. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could find that defendant possessed the guns. Accordingly, defendant's conviction for felon-in-possession of a firearm is supported by sufficient evidence.

Defendant claims that his convictions for possession of child sexually abusive material are not supported by sufficient evidence because the pictures contained images of simple nudity, not erotic nudity. Defendant also argues that because the images were not on display—they were found in the mess in his bedroom—there was no evidence that he knew of the pictures. In addition, defendant argues that he could justifiably assume that he was allowed to possess the pictures that the police returned to him at the conclusion of the 2000 incident.

Under MCL 750.145c(4), a person is prohibited from "knowingly possess[ing] any child sexually abusive material." "Child sexually abusive material" is defined as "any depiction . . . including a developed or undeveloped photograph . . . which is of a child or appears to include a child engaging in a listed sexual act . . . ." MCL 750.145c(1)(m). A "listed sexual act" is "sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity." MCL 750.145c(1)(h). All these terms are statutorily defined. See MCL 750.145c(1)(f), (g), (i), (j), (n), (o), (p). Specifically, "erotic nudity" is defined as "the lascivious exhibition of the genital, pubic, or rectal area of any person. . . . '[L]ascivious' means wanton, lewd, and lusting and tending to produce voluptuous or lewd emotions." MCL 750.145c(1)(g).

Six pictures formed the basis of the two charges for possession of child sexually abusive material: two pictures of Blok, three pictures of an unidentified girl; and one picture, processed from a negative, of Campbell. The two pictures of Blok, found in defendant's bedroom, in either a bag or a basket near the bed, were taken by defendant at a nudist camp when Blok was either 14 or 15 years old. In the pictures, Blok was sitting naked on a chair; she was covering herself up, with her arms crossed. Her genitals and breasts were visible. The three pictures of the unidentified girl were also found near the bed in defendant's bedroom. Pols believed the pictures

were taken at a nudist camp. The picture of Campbell, which was taken by defendant, was of Campbell standing naked in a shower. Campbell believed that the pictures were taken at a nudist camp when she was 14 or 15 years old.

These six pictures were displayed to the jury during trial. At the conclusion of trial, the trial court instructed the jury on the definition of "child sexually abusive material," informed them that a "listed sexual act" includes sexual intercourse, erotic fondling, masturbation, passive sexual involvement, sexual excitement, or erotic nudity, and provided definitions of each of those acts. Defendant makes no argument that the jury was improperly instructed. In light of the deference that we must afford to the jury's determinations, see *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992)[5], we find no reason to upset the jury's determination that the pictures constituted child sexually abusive material.

We reject defendant's argument that the evidence was insufficient for the jury to find that defendant knew he possessed the five pictures and the negative. Blok and Campbell testified that defendant took the pictures of them. The pictures of Blok and the unidentified girl were found in defendant's bedroom, in either a bag or basket near his bed. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could find that defendant knew he possessed the pictures and the negative.

We also reject defendant's reliance on the public duty doctrine to argue that he could justifiably assume that he was allowed to possess the pictures that the Wyoming Police Department returned to him at the conclusion of the 2000 incident. "The public-duty doctrine is a doctrine of tort law that determines whether a duty in tort exists." *Gazette v City of Pontiac*, 221 Mich App 579, 582; 561 NW2d 879 (1997). The doctrine insulates police officers from tort liability for the negligent failure to provide police protection unless the individual plaintiff satisfies the special-relationship exception. *Id.* We see no relevance between the public duty doctrine and the present case. Moreover, defendant's conviction resulting from the 2000 incident was based on pictures that were not returned to defendant, which included duplicates of the two pictures of Blok taken at a nudist camp. Based on this evidence, a rational jury could conclude that defendant knew it was against the law to possess the two pictures of Blok, the three nude pictures of the unidentified girl, and the negative of the nude picture of Campbell. We conclude that defendant's convictions for possession of child sexually abusive material are supported by sufficient evidence.

Defendant argues that his conviction for accosting a minor is not supported by sufficient evidence because his conduct did not go "far enough to cross the line between legal [and] illegal conduct." He contends that his actions toward JR were, at most, preparation for a possible sexual encounter.

Under MCL 750.145a, a person "who accosts, entices, or solicits a child less than 16 years of age . . . with the intent to induce or force that child . . . to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of

[5] Opinion amended 441 Mich 1201 (1992).

depravity or delinquency . . . is guilty of a felony[.]" The statute does not define the terms "accost," "entice," or "solicit." We may therefore consult a dictionary to determine the terms' ordinary and accepted meanings. *People v Haynes*, 281 Mich App 27, 29; 760 NW2d 283 (2008). To "accost" means "to confront boldly," "to approach with a greeting, question, or remark," or "to solicit for sexual purposes." *Random House Webster's College Dictionary* (1992). To "entice" means "to lead on by exciting hope or desire; allure; tempt; inveigle." *Id.* And to "solicit" means "to try to obtain by earnest plea or application," "to entreat; petition," to seek to influence or incite to action" or "to offer to have sex with in exchange for money." *Id.*

Here, JR testified that, as she was walking to her friend's house, she was stopped by defendant. During the encounter, defendant asked JR if she was a virgin. After she replied that it was none of his business, defendant asked JR if she wanted to have sex with him. While defendant's conduct could generally be characterized as an attempt to have a sexual encounter with JR, his conduct, when viewed in the light most favorable to the prosecution, constitutes the crime of accosting a child for immoral purposes. By asking JR to have sex with him, defendant accosted, or boldly confronted, JR with the intent to induce JR to submit to an act of sexual intercourse.[6] Accordingly, we reject defendant's argument that his conviction for accosting a child for immoral purposes is not supported by sufficient evidence.

III. EVIDENTIARY ERROR

Defendant argues that evidentiary errors, either individually or in their totality, require reversal of his convictions. We disagree.

We review a trial court's evidentiary decisions for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id.* at 217. Unpreserved claims of evidentiary error are reviewed for plain error affecting the defendant's substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

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[6] We find no merit to defendant's argument that, in reviewing the evidence to support his conviction for accosting a minor, we should not afford "the normal deference to the jury regarding credibility." According to defendant, because the jury was "so overwhelmed with "lustful disposition" evidence, this evidence rather than JR's testimony was most likely the basis for the jury's convictions. However, case law requires us to make all credibility choices in favor of the jury verdict. *Nowack*, 462 Mich at 400. In addition, as discussed in part III, *infra*, no evidence was introduced to establish defendant's "lustful disposition."

Defendant makes the same argument regarding the credibility of Heiss and Simones and his convictions for allowing a child to engage in child sexually abusive activity and producing child sexually abusive material. However, he makes no argument that the testimony of Heiss and Simones, when viewed in the light most favorable to the prosecution, was insufficient to sustain the convictions.

Defendant first argues that the "pre-2001" evidence, which we believe refers to the testimony of Blok, Campbell, and Wheeler, was improper bad acts evidence under MRE 404(b). Defendant also claims that the testimony of these three witnesses was "lustful disposition" evidence and was irrelevant as it concerned events that occurred a decade earlier.

Before trial, the prosecutor sent notice to defendant that she intended to introduce the testimony of Blok, Campbell, and Wheeler under MRE 404(b) as proof of defendant's intent and as evidence of a scheme, plan, or system in doing an act. Defendant did not file a pretrial motion in limine to suppress the testimony of these three witnesses. In addition, while defendant objected to the admission of various pictures of Blok, Campbell, and Wheeler, defendant never objected to their testimony. Accordingly, the issue whether the "pre-2001 evidence" was erroneously admitted is unpreserved.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. It is admissible, except as otherwise provided by the constitution of the United States, the Michigan constitution, the rules of evidence, or other rules adopted by the Michigan Supreme Court. MRE 402. Irrelevant evidence is not admissible. *Id.*

Evidence of a defendant's character, which includes evidence of his other crimes, acts, or wrongs, is not admissible to prove action in conformity therewith. MRE 404(a); *People v Starr*, 457 Mich 490, 494-495; 577 NW2d 673 (1998). MRE 404(b)(1) provides a means for the proper admission of a defendant's bad acts. *Starr*, 457 Mich at 495. The rule provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b)(1), bad acts evidence must (1) be offered for a proper purpose, which is a purpose other than to show the defendant's character and action in conformity, (2) be relevant to an issue of fact that is at consequence at trial, and (3) have a probative value that is not substantially outweighed by unfair prejudice. *People v Steele*, 283 Mich App 472, 479; 769 NW2d 256 (2009). Upon request, a trial court may provide a limiting instruction. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

Our Supreme Court has not adopted the "lustful disposition" rule. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). This rule "allows the use of other acts for propensity purposes in sex offense cases." *Id.* at 61. Specifically, it "allow[s] uncharged similar sexual misconduct evidence to be used by the trier of fact in determining the defendant's lustful disposition by circumstantial proof of a general character trait, followed by an inference from that inductively provided general character trait that the defendant committed the crime charged in the indictment." *Id.* at 60 n 7 (quotation marks and citation omitted).

The prosecutor introduced evidence of defendant's acts toward Blok, Campbell, and Wheeler to establish defendant's scheme, plan, or system in doing an act. "[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Sabin*, 463 Mich at 63. General similarity between the charged acts and the uncharged acts is not enough to establish a common plan, scheme, or system; rather, there must be "a concurrence of common features" that the acts, both charged and uncharged, are seen as part of a plan, scheme, or system. *Id.* at 64-65. A high degree of similarity is not required, *Steele*, 283 Mich App at 480, nor are distinctive or unusual features, *People v Hine*, 467 Mich 242, 252-253; 650 NW2d 659 (2002).

Here, Heiss testified that defendant would give her money and buy her clothes. Defendant took pictures of Heiss clothed before he asked her to pose for topless or nude pictures. In exchange for posing topless, defendant gave Heiss money. Defendant's charged acts toward Heiss share sufficient common features to infer a plan, system, or scheme in doing an act. Blok, Campbell, and Wheeler all testified that after they met defendant, he began buying them things, such as food, clothes, shoes, alcohol, and cigarettes, or giving them money. It was then that defendant started taking pictures of them topless or nude, and Blok testified that defendant's first pictures of her were clothed. In addition, Blok testified that defendant gave her money or bought her stuff in exchange for posing topless for pictures, and while Wheeler never received anything from defendant for posing topless, she testified that defendant promised to pay her for the pictures. Admittedly, defendant's charged acts toward Simones share less features to infer a plan, system, or scheme in doing an act because, as Simones testified, she posed topless for pictures the first time she met defendant. Nonetheless, there remain sufficient similarities between defendant's charged acts toward Simones and his uncharged acts. Defendant gave Simones money in exchange for posing topless and, as he did to Blok and Wheeler, defendant instructed Simones regarding how to pose. We conclude that the testimony of Blok, Campbell, and Wheeler was offered for the proper purpose of establishing defendant's plan, scheme, or system in doing an act. Because the testimony was offered for this purpose, the testimony of the three witnesses was not improper "lustful disposition" evidence.

In addition, the testimony of Blok, Campbell, and Wheeler was relevant to a fact of consequence at trial. Because no topless or nude pictures of Heiss or Simones taken before they reached the age of 18 were found in defendant's house, defendant claimed that no such pictures were taken. Accordingly, the testimony was probative of whether, as claimed by Heiss and Simones, defendant took topless or nude pictures of them while they were under the age of 18 years. Further, the testimony of Blok, Campbell, and Wheeler was not rendered irrelevant because defendant's acts toward them occurred a decade earlier. "The remoteness of an act only affects the weight of the evidence rather than its admissibility." *People v McGhee*, 268 Mich App 600, 611-612; 709 NW2d 595 (2005). Accordingly, defendant has not shown plain error in the admission of the testimony of Blok, Campbell, and Wheeler.

Defendant next claims that the trial court committed error in the admission of the "retained evidence," which we believe generally refers to the pictures that had been retained by the Wyoming Police Department in regard to the 2000 incident. Defendant claims that the retained evidence was irrelevant and was "lustful disposition" evidence.

The pictures that were retained by the Wyoming Police Department in the 2000 incident and admitted into evidence were of Blok, Campbell, and Wheeler. The pictures served the purpose of corroborating the testimony of the three witnesses. Thus, the pictures were relevant. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995) ("If a witness if offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant . . . ."). The pictures had a tendency to make more probable the fact that defendant utilized a common plan, scheme, or system. MRE 401. In addition, because the pictures served to corroborate the testimony of Blok, Campbell, and Wheeler, which was proper testimony of defendant's prior bad acts, the pictures cannot be classified as "lustful disposition" evidence.

Defendant presents specific arguments regarding two of the pictures that were retained by the Wyoming Police Department. He asserts that the nude picture of Campbell which contained a mirrored reflection of him nude and the nude picture of Blok laying on defendant's bed with legs spread were "lustful disposition" evidence. He also claims that the pictures were "inflammatory."

As already stated, two pictures of Blok and one picture of Campbell processed from a negative formed, in part, the basis of the two charges for possession of child sexually abusive material. It was defendant's position, as articulated in his opening statement, that the pictures that formed the basis for the two possession counts displayed simple nudity, rather than erotic nudity. The trial court found that the picture of Blok laying on defendant's bed was erotic nudity, and held that the picture strongly suggested that the two pictures of Blok that formed, in part, the basis of the possession charges, while less graphic, were also erotic nudity. Erotic nudity, which is a "listed sexual act," is defined as "the lascivious exhibition of the genital, pubic, or rectal area of any person." MCL 750.145c(1)(g). "Lascivious" means "wanton, lewd, and lusting and tending to produce voluptuous or lewd emotions." *Id*. We agree with the trial court that the picture of Blok laying on defendant's bed is relevant to the issue whether the two pictures of Blok sitting nude in a chair at a nudist camp were erotic nudity. The existence of the very graphic picture of Blok laying on defendant's bed, which defendant took, makes it more probable that the two pictures of Blok taken at the nudist camp contained a "lascivious exhibition" of Blok's genital area. The same analysis can be applied to the picture of Campbell with defendant reflected in a mirror: the existence of this picture, which defendant took while standing in the background naked, makes it more probable that the picture of Campbell standing nude in the shower contained a depiction of a "listed sexual act." The pictures were not used to provide an inference from an inductively proved general character trait that defendant committed the charged crimes. *Sabin*, 463 Mich at 60 n 7. Accordingly, the pictures were not "lustful disposition" evidence.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. According to defendant, the probative value of the pictures of Campbell and Blok was "nil" because the pictures were only evidence of a "lustful disposition." However, as already concluded, the pictures were not "lustful disposition" evidence. In addition, the trial court, after viewing the pictures, ruled that the pictures were not unduly prejudicial under MRE 403. "Rule 403 determinations are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony by the trial judge." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008) (quotation marks and citation omitted).

Defendant has provided us no reason to conclude that the trial court abused its discretion in its MRE 403 determination regarding the pictures of Blok and Campbell.

Defendant also asserts that the trial court erred in allowing Blok to testify that shortly after defendant took the picture of her laying naked on his bed, defendant engaged in sexual contact with her. Defendant claims that this evidence was unfairly prejudicial.

The trial court allowed the prosecutor to ask Blok whether defendant had sexual contact with her around the time defendant took the picture of her laying on his bed with her legs spread. According to the trial court, the fact that defendant previously possessed an "extremely explicit" picture of Blok and around the time that the picture was taken had engaged in sexual contact with Blok was "very relevant" to whether the pictures of Blok at the nudist camp depicted "lascivious conduct." To reduce the prejudicial impact of Blok's testimony, the trial court instructed the prosecutor to ask Blok in a "very leading" manner whether it was true that defendant touched her body in a sexual way. Pursuant to that instruction, the prosecutor asked Blok, "Now, Sara, isn't it true that around the time that that picture was taken, that the defendant had physical sexual contact with you?" Blok answered, "Yes."

We find sound the trial court's reasoning that Blok's testimony concerning defendant's sexual contact with her was "very relevant." Accordingly, contrary to defendant's claim, Blok's testimony was not "lustful disposition" evidence; it was not used to prove a general character trait of defendant. *Sabin*, 463 Mich at 60 n 7. Because the trial court, in order to limit the prejudicial impact of Blok's testimony, only allowed the prosecutor to ask if it was, in fact, true that defendant had physical sexual contact with Blok around the time the picture was taken, there was no danger that the jury would give Blok's testimony undue or preemptive weight. *People v Schaw*, 288 Mich App 231, 238; 791 NW2d 743 (2010). Accordingly, Blok's testimony concerning defendant's sexual contact with her was not improperly admitted.[7]

Defendant next argues that the trial court erred in admitting evidence that young female undergarments were found in his bedroom. He claims that the evidence was irrelevant and "lustful disposition" evidence.

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[7] Defendant claims that the trial court, by allowing the prosecution to present evidence concerning his conviction in the 2000 incident, rendered the protections afforded him by *Old Chief v United States*, 519 US 172; 117 S Ct 644; 136 NW2d 574 (1997), nugatory. In *Old Chief*, the United States Supreme Court held that where the defendant is charged with felon-in-possession of a firearm, it may be error for the trial court to admit evidence of the name and nature of the defendant's underlying conviction, where the defendant has agreed to stipulate to the fact of the prior conviction. *Id.* at 191-192; see also *People v Swint*, 225 Mich App 353, 377-379; 572 NW2d 666 (1997). In this case, however, evidence of defendant's prior conviction was not offered for the purpose of establishing defendant's status as a felon. In fact, when it instructed the jury on the elements of felon-in-possession, the trial court stated that the parties had stipulated that defendant had previously been convicted of a "specified felony." Defendant's reliance on *Old Chief* is misplaced.

To establish that defendant accosted JR for immoral purposes, the prosecution needed to prove that defendant had "the intent to induce or force" JR to submit to an act of sexual intercourse. MCL 750.145a. A defendant's intent can be difficult to prove, *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008), and it can be proven by circumstantial evidence, *People v Ericksen*, 288 Mich App 192, 197; 793 NW2d 120 (2010). Here, the fact that defendant kept young female undergarments near his bed made it more probable that defendant, when he asked JR if she wanted to have sex with him, intended to induce or force JR to commit an act of sexual intercourse. MRE 401. Accordingly, the undergarment evidence was relevant. In addition, the undergarment evidence was not "lustful disposition" evidence. It was not used to prove a general character trait of defendant. *Sabin*, 463 Mich at 60 n 7.

Defendant claims that the evidence of tissues found around his bed was irrelevant and evidence of a "lustful disposition." According to defendant, the tissues were evidence of a "lustful disposition" because they indicated that he masturbated.

In response to a question from the prosecutor about what was shown in a picture taken of defendant's bedroom during the execution of the search warrant, Pols answered, in part, "Also, we noted there was numerous Kleenexes around the floor surrounding the bed."[8] After the prosecutor had previously moved to admit 29 pictures taken of defendant's house during the execution of the search warrant, defendant, upon questioning by the trial court stated that he had "no objection" to the admission of the 29 pictures. Accordingly, defendant has waived any error concerning the pictures in which the tissues appeared. See *People v Kowalski*, 489 Mich 488, ___; ___ NW2d ___ (2011).[9]

IV. MISTRIAL

Defendant claims that the trial court erred in denying his motion for a mistrial. Specifically, he argues that the prejudice resulting from JR's unsolicited response that he was a "child molester" could not be cured with a cautionary instruction because his trial had already been invaded with evidence of his "lustful disposition." We disagree.

We review a trial court's decision on a motion for a mistrial for an abuse of discretion. *Schaw*, 288 Mich App at 236.

During her testimony, JR recalled going to defendant's house when she was "pretty young" and that defendant took pictures of her with her clothes on. When the prosecutor asked JR why she would go to defendant's house, JR replied, "Because I was young. I didn't know that he was a child molester at first." The trial court immediately instructed the jury "to disregard that last comment" and to give it "no evidentiary value or weight." It then excused the

[8] This is the only reference to tissues that we found in the trial testimony of the witnesses.

[9] Because there were no evidentiary errors, defendant's claim that the cumulative effect of errors denied him a fair trial must be rejected. *People v Brown*, 279 Mich App 116, 145-146; 755 NW2d 664 (2008).

jury, at which time defendant moved for a mistrial. Defendant admitted that JR's comment was "clearly unsolicited testimony," but argued that prejudice resulting from the testimony could not be cured with an instruction. The trial court denied the motion for a mistrial. It believed that the "bell [could] be unrung" and that the bell was already unrung with its previous instruction. Nonetheless, when the jury returned, the trial court further instructed the jury that the "last comment" by JR was "just inappropriate" and that they were to "completely disregard it." It stated that JR "is a fact witness. She'll tell us who, what, when and where as far as observations, but the other comment is inadmissible, inappropriate. Disregard. Give it no value whatsoever."

"A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Schaw*, 288 Mich App at 236 (quotation marks and citation omitted). A mistrial is appropriate only where the resulting prejudice to the defendant cannot be removed in any other way. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). In addition, a witness's unresponsive and volunteered answer to a proper question is not grounds for granting a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Here, JR's testimony that defendant was a "child molester" was unresponsive to the prosecutor's question. The trial court, even before defendant objected, instructed the jury to disregard the comment. It again instructed the jury to ignore the comment after it denied the motion for a mistrial. We find no abuse of discretion in the trial court's determination that its instructions could cure any prejudice to defendant. A jury is presumed to follow its instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and instructions are presumed to cure most errors, *Horn*, 279 Mich App at 36. In addition, because the prosecutor did not pervade the trial with inadmissible evidence of defendant's "lustful disposition," we reject defendant's argument that a cautionary instruction was insufficient to cure the prejudice resulting from JR's unsolicited characterization of defendant. We affirm the trial court's denial of defendant's motion for a mistrial.

V. RIGHT TO A FAIR TRIAL

Defendant asserts that the evidentiary errors previously complained of, when viewed in a constitutional context, deprived him of his constitutional right to a fair trial. However, defendant has not properly presented this issue for appellate review. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant presents no legally-supported argument explaining how the prosecutor's conduct in either presenting or arguing the evidence ran afoul of his constitutional right to a fair trial. Accordingly, defendant has abandoned the issue.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens